Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article I, Section 9, Clause 5 of the U.S. Constitution (the "Export Clause") provides that "No Tax or Duty shall be laid [by Congress] on Articles exported from any State." Issue here:

> Whether articles shipped from one State to another are "Articles exported from any State," such that the Harbor Maintenance Tax, 26 U.S.C. 4461-62, is unconstitutional when laid on shipments in interstate commerce, just as the tax is unconstitutional when laid on shipments from States to foreign countries as *per United States v. U.S. Shoe Corp*, 523 U.S. 360, 140 L.Ed.2d 453 (1998).

PARTIES TO PROCEEDING

All parties to this proceeding are named in the caption.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Florida Sugar Marketing and Terminal Association, Inc. is a marketing cooperative with the following members:

Atlantic Sugar Association, Inc.
Okeelanta Corporation
Osceola Farms Company
Sugar Cane Growers Cooperative
United States Sugar Corporation

No member is publicly owned.

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PETITION FOR A WRIT OF CERTIORARI

Florida Sugar Marketing and Terminal Association, Inc. ("Florida Sugar"), Petitioner, prays that this Honorable Court issue a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") entered in this case on July 28, 2000.

OPINIONS BELOW

The decision of the Court of Appeals (affirming the decision of the United States Court of International Trade ("CIT" or "Trial Court")) is reported at

220 F.3d 1331 (App. A, *infra*, 1-25). The CIT decision is reported at 40 F. Supp.2d 479 (App. B, *infra*, 26-29).

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 2000. This petition for a *writ of certiorari* was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional, statutory, and regulatory provisions are involved, all of which are set forth in attached Appendix C (App. C., *infra*, 30-35).

1. Article I, Section 9, Clause 5 of the Constitution of the United States. App. C at 30.

2. Sections 4461 and 4462 of Title 26, United States Code. App. C at 30-32.

3. Section 24.24 of Title 19, Code of Federal Regulations. App. C at 32-35.

STATEMENT

On its face the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461-4462, requires shippers to pay an *ad valorem* charge on shipments of cargo through the Nation's ports.[1] At the time relevant to this litigation, Petitioner paid the HMT on cargo shipped from one State to another. Those payments are the subject of the instant civil proceeding. Petitioner contends that the taxes were assessed in violation of the Export Clause, and that all amounts should be refunded.

This Court has already ruled that the HMT is unconstitutional for violating the Export Clause in a case that involved shipments from a State to a *foreign country*. In *United States v. U.S. Shoe Corp., supra,* the Court held that the charge was more than a mere fee to cover port-use, and that the exaction was therefore a tax on "Articles exported from any State." The only material difference between *U.S. Shoe* and the fact pattern here is that *U.S. Shoe* involved shipments to a foreign destination while this case involves shipments in interstate commerce.

The Court of Appeals refused to extend *U.S. Shoe* to the instant fact pattern. The Court held that

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[1] The HMT was enacted as part of the Water Resources Development Act of 1986, Pub. L. 99-662, sec. 1402(a), 100 Stat. 4082, 4266. The revenues fund projects such as harbor dredging. This Court described the tax in *United States v. U.S. Shoe Corp, supra,* 523 U.S. at 363, 140 L.Ed.2d at 457.

the term "exported," as used in the Export Clause, does not reach shipments from one State to another; it only reaches shipments to foreign countries. The Court therefore refused to order refunds of the taxes in issue.

The question presented is purely legal. The Court of Appeals stated as follows: "[n]o facts are in dispute, the only question *** being one of constitutional interpretation." App. at 4.

The Trial Court possessed jurisdiction under 28 U.S.C. 1581(i) (the CIT's so-called "residual" jurisdiction). *See United States v. U.S. Shoe,* 523 U.S. at 365, 140 L.Ed.2d at 459. The Court of Appeals possessed jurisdiction under 28 U.S.C. 1295(a)(5) (jurisdiction to review CIT decisions).

REASONS FOR GRANTING THE PETITION

I. The constitutional issue here should be, but has not been, settled by this Court.

The issue here concerns the limits of Congress' constitutional power to tax. Article I, Section 8, Clause 1 of the Constitution broadly grants such power to Congress, but the Export Clause limits the grant by prohibiting taxes on "export[s]" from States. The issue of whether this limitation prohibits taxes on interstate shipments is therefore fundamentally important and carries far reaching ramifications. Yet, as the Court of Appeals stated below, "the Supreme Court has never directly addressed the issue

in this case ***."[2] App. at 5. The Court was referring to the Export Clause itself and whether it applies to interstate shipments; it was not merely referring to the constitutionality of the HMT.

It is true that this Court *has* in the past addressed the meanings of "import" and "export" for purposes of a different provision, *viz.*, the *Import/Export Clause*, *see* below, which prohibits *States* from laying taxes on "Imports or Exports" in most situations.[3] It further is true that, for *that* provision, this Court has construed the terms to apply exclusively to shipments in foreign commerce, as distinct from shipments between States. But the leading case is *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 136, 19 L.Ed. 382, 386 (1869), a split decision which is inconsistent with a prior Supreme Court ruling[4] and has repeatedly prompted sharp criticism.[5] As

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[2] There is *dicta* on point but no case holding. *See, e.g., Dooley v. United States,* 183 U.S. 151, 153, 46 L.Ed. 128, 130 (1901).

[3] Article I, Section 10, Clause 2, U.S. Constitution provides: "No State, shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; ***."

[4] *Almy v. California*, 65 U.S. (24 How.) 169, 16 L.Ed. 644 (1861), (holding that the Import/Export Clause prohibited a State tax in connection with a shipment from California to New York).

[5] *See, e.g.*, dissent in *Woodruff* itself, 75 U.S. (8 Wall.) at 140 *et seq.*, 19 L.Ed. at 389 *et seq.*, and in

recently as 1997, for example, Justices Thomas and Scalia analyzed the case at length and stated "that *Woodruff* was, in all likelihood, wrongly decided," and they suggested that the case be reconsidered. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 520 U.S. 564, 636, 137 L.Ed.2d 852, 903 (1997) (Thomas, *J.*, dissenting, Scalia, *J.*, joining in dissent).[6] In essence, the Justices concluded that *Woodruff* was premised on a misconception of the Framers' understanding.

Woodruff and its progeny should not impact the Export Clause in these circumstances. Rather, Petitioner respectfully urges this Court to give that Clause its own examination in a case arising under the Clause, this being an appropriate case. The Clause is basic to Congress' powers and permissible

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Dooley v. United States, 183 U.S. at 167 *et seq.*, 46 L.Ed. at 135 *et seq.* Please note: Justice Nelson's dissent in *Woodruff* is mis-located and appears in the case following *Woodruff*. It is located correctly in the official reports.

[6] *Camps* involved the so-called "negative Commerce Clause." The majority in *Camps* did not address *Woodruff*, much less the *Woodruff* definitions. However, Justice Thomas (Justice Scalia joining) reasoned that the issue in *Camps* should have turned on the Import/Export Clause, not the "negative Commerce Clause," and analyzed *Woodruff* in taking this view. They concluded that *Woodruff* was wrong and should be re-examined in a future case.

methods of regulating commerce; it therefore merits direct consideration.

II. It is important to correct the Appellate Court's error.

Petitioner in the Trial Court presented an extensive demonstration that the words "exports" and "imports" encompassed interstate shipments in 18th century American understanding. The demonstration included examples of commercial, lexical, and legal usage, and it relied on still additional sources assembled by Justices Thomas and Scalia in their dissenting opinion in *Camps.*[7] *See* 137 L.Ed.2d at 893-900. The United States conceded the point; it stated to the Trial Court: "We do not quarrel with plaintiff's [Petitioner's] extensive examples from the Founding Era referring to domestic shipments as 'imports' and 'exports.'" United States CIT Reply Brief (Feb. 1, 1999), at 7. Thereafter, the Court of

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[7] Among many others, the Justices cited this source, for example: In 1785 a farmer wrote to a Connecticut newspaper that the State could enrich itself "[b]y making and refining Cyder for *exportation* with which we might supply the *Southern States*, as well as the large provinces of Quebec and Nova-Scotia." *The Connecticut Farmer, New Haven Gazette,* October 6, 1785, quoted in the Thomas/Scalia Dissent, 520 U.S. at 622, 137 L.Ed.2d at 894 (emphasis added by Justice Thomas), and re-quoted in Petitioner's Appellate Court brief-in-chief (Aug. 20, 1999), at 9. A host of additional examples exist and were presented to the Trial Court.

Appeals likewise agreed; it stated: "the evidence assembled by Florida Sugar [Petitioner] may be more than adequate to demonstrate a usage [at the time] ***." App. at 8. The Court disregarded the showing, however, and ruled against Petitioner's position; it concluded that the terms' *legal* meanings should be narrower than common understanding, and it therefore gave the Export Clause the narrow construction now under challenge.

Common usage in the Founding Era indicates the Framers' understanding and therefore the Constitution's meaning, certainly as a point of departure. *See Alden v. Maine,* 527 U.S. 706, 741, 144 L.Ed.2d 636, 670 (1999) (looking to original understanding in construing the Eleventh Amendment). In the words of this Court, courts normally "do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533, 539, 88 L.Ed. 1440, 1449 (1944). Justice Scalia has written as follows: "I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." *Minnesota v. Dickerson*, 508 U.S. 366, 379, 124 L.Ed.2d 334, 348 (1993) (Scalia, *J.*, concurring).

The Court of Appeals disregarded these rules as it construed the Constitution here, and thereby

reasoned to an erroneous conclusion.[8] Petitioner respectfully requests that this Court correct the error of the Court of Appeals.

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[8] The Court reviewed the debates at the Constitutional Convention and concluded that discussions of the Export Clause were always in reference to foreign commerce, App. at 10, an observation made also in *Woodruff, see* 75 U.S. at 136, 19 L.Ed. at 386. Justices Thomas and Scalia, however, dismissed the conclusion as reached in *Woodruff*, writing: "In order to support its contention, *** the *Woodruff* Court was obligated to show not merely that the words 'duty,' 'impost,' and 'imports' were used in reference to foreign goods, but that foreign goods were the *exclusive* reference. Contrary to the *Woodruff* Court's claim, the historical record does not appear to support such an exclusive use of the words." 520 U.S. at 627-628, 137 L.Ed.2d at 897 (emphasis in original). The Court of Appeals also analyzed the overall constitutional scheme and concluded that the Export Clause should be given a narrow construction in light of the objectives of *other* provisions. App. at 15-18. But this analysis disregards the high importance of original understanding in constitutional interpretation, *see* above. In any case, the analysis underscores the need for *this* Court to review the issue presented: *This* Court should provide final teaching on the constitutional scheme.

III. This case is as important as *United States v. U.S. Shoe Corp.*, a case this Court determined to hear.

This Court granted *certiorari* in *United States v. U.S. Shoe Corp., supra,* to determine whether the HMT contravened the Export Clause in a case that happened to involve foreign commerce. Thus, the Court considered the tax-issue there to be sufficiently important to merit review. It then reached a negative determination and required refunds of unlawful taxes.

The issue here is equally important. Like the taxpayer in *U.S. Shoe*, Petitioner paid the HMT on cargo shipped though the Nation's ports, and undoubtedly many other taxpayers also pay the tax.[9]

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[9] On January 13, 2000, the Secretary of the Army reported to Congress that the HMT generated $39,158,000 from so-called "domestic" shipments in FY 1998. Secretary of the Army, *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1998* (Dec. 1999), at 13, www.wrsc.usace.mil/iwr/pdf/annualrpt98.pdf. The report distinguishes "domestic" shipments from "Imports," "Exports," "Foreign Trade Zones," and "Passengers," *id.*, such that the category necessarily encompasses both interstate and intrastate shipments. Petitioner knows of no statistics distinguishing between these two sub-types. However, "domestic" shipments obviously include coastal shipments, Great Lakes shipments, and possibly shipments on

The United States, however, refuses refunds as it gives *U.S. Shoe* a narrow application. Petitioner respectfully believes that this Court should determine the reach of its prior decision.

CONCLUSION

For all of the reasons stated above, Petitioner prays that this Honorable Court grant this petition for a *writ of certiorari*.

Respectfully submitted,

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Dated: October 25, 2000

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the Mississippi River. Numerous taxpayers are undoubtedly affected.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-1440

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC., PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE.

Decided: July 28, 2000

Before: NEWMAN, MICHEL, and GAJARSA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MICHEL.

MICHEL, *Circuit Judge*.

Florida Sugar Marketing and Terminal Association, Inc. ("Florida Sugar") appeals from a decision of the United States Court of International Trade dismissing Florida Sugar's claim for refund of the Harbor Maintenance Tax ("HMT") for failure to state a claim. In this HMT test case, the trial court held that the Export Clause of the United States Constitution, U.S. Const. Art. I, § 9, cl. 5, does not prevent

Congress from imposing the HMT on Florida Sugar's shipments between seaports of different states because the clause applies only to shipments to foreign countries, not to interstate shipments. *See Florida Sugar Mktg. & Terminal Ass'n, Inc. v. United States*, No. 99-28, slip op. at 5 (Ct. Int'l Trade Mar. 23, 1999). Florida Sugar timely appealed to this court. The appeal was submitted for our decision following oral argument on April 7, 2000. Because we hold that the Export Clause does not prohibit the federal government from imposing taxes or duties on interstate shipments, we affirm the trial court's dismissal of this action.

BACKGROUND

The HMT, enacted in 1986 as part of the Water Resources Development Act ("WRDA"), Pub. L. No. 99-662, §1402(a), 100 Stat. 4082, 4266, provides funding for maintenance of the nation's seaports. The HMT imposes a levy on commercial vessels using the ports. The statute directs that the HMT be assessed on importers, exporters, domestic shippers, and commercial passenger transport. *See* 26 U.S.C. §§ 4461, 4462 (1994 & Supp. III 1997).[10] The reve-

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[10] The relevant portion of the statute reads as follows:

§ 4461. Imposition of Tax.

(a) General Rule. -- There is hereby imposed a tax on any port use.

(b) Amount of Tax. -- The amount of the tax imposed by subsection (a) on any port use shall

nues from the HMT fund WRDA projects such as harbor dredging. In the case of interstate shipments, the tax is imposed on the shipper and liability attaches at the time of unloading. Between January 27, 1995 and February 20, 1998, Florida Sugar paid HMT on sugar it shipped by vessel from one state to another. Those payments are the subject of this appeal.

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be an amount equal to 0.04 percent of the value of the commercial cargo involved.

(c) Liability and Time of Imposition of Tax. --

(1) Liability. -- The tax imposed by subsection (a) shall be *paid by* --

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) *in any other case, the shipper.*

(2) Time of Imposition. -- Except as provided by regulations, the tax imposed by subsection (a) *shall be imposed* --

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) *in any other case, at the time of unloading.*

Pub. L. No. 99-662, § 1402(a), 100 Stat. 4082, 4266 (codified as amended at 26 U.S.C. §§ 4461, 4462) (emphasis added).

The Export Clause constrains the federal taxing power, providing that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, cl. 5. In *United States Shoe Corp. v. United States*, 523 U.S. 360, 370 (1998), the Supreme Court affirmed this court's holding that the HMT, as applied to exports to foreign countries, was an unconstitutional tax, rather than a "user fee." This court has subsequently held that the application of the HMT to exports is severable from the other applications of the tax, such as to imports and passage on passenger liners. *See Carnival Cruise Lines v. United States*, 200 F.3d 1361, 1369 (Fed. Cir. 2000).

Following the decision in *U.S. Shoe*, a number of cases were filed in the Court of International Trade seeking refunds of HMT payments on the ground that the tax was unconstitutional. Florida Sugar's suit was designated as a test case for the question of whether the Supreme Court's ruling in *U.S. Shoe* would extend to interstate shipments. The Court of International Trade held that it did not and dismissed the complaint for failure to state a claim. *See Florida Sugar*, slip op. at 5. Florida Sugar timely appealed to this court, which has jurisdiction under 28 U.S.C. § 1295(a)(5) (1994).

DISCUSSION

Florida Sugar argues that the Export Clause must reach shipments between seaports in various states of the Union because, at the time of the Constitutional Convention, the word "exports," as commonly used, encompassed shipments among the sev-

eral states. In addition, Florida Sugar argues that the language in the Supreme Court decisions, on which the Court of International Trade decision relied, is incorrect dicta that should not be followed by this court.

No facts are in dispute, the only question before this court being one of constitutional interpretation. On such questions of law, decisions of the Court of International Trade are subject to *de novo* review by this court. *See Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995). Because the Supreme Court has never directly addressed the issue in this case, we look first to the language of the Constitution and the evident intent of the Framers. We also seek guidance in the Supreme Court's statements regarding the breadth of the Export Clause prohibition, although those statements are made in the context of international, not interstate, shipments.

I.

A.

The issue we face here is whether the Framers intended the Export Clause to prohibit taxes only on goods shipped from the United States to foreign nations, or whether they also intended to withhold from the federal government the authority to tax any movement of goods between states. Florida Sugar argues for the latter interpretation, based upon eighteenth century common usage of the term "export" to describe both interstate and foreign com-

merce. In support of its argument, Florida Sugar makes an extensive showing that common usage of the term "export" often included shipments to other states in the Union.

Florida Sugar also relies heavily on a dissenting opinion discussing the dormant Commerce Clause, in which Justices Scalia and Thomas expressed their view that "a strong argument can be made that for the Constitution's Framers and ratifiers . . . the terms 'imports' and 'exports' encompassed not just trade with foreign nations, but trade with *other states* as well." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 621 (1997) (Thomas, J., dissenting) (emphasis in original). Like the dissenters in *Camps Newfound*, Florida Sugar points to numerous examples of eighteenth century usage of the terms. It cites, for example, a letter to a Connecticut newspaper asserting that the state could produce stockings "sufficient not only to supply [itself], but for *exportation* to other States." Appellant's Brief at 9 (citing a reprint in the *Massachusetts Centinel*, Sept. 5, 1787) (emphasis added). Many similar letters and advertisements are also cited. Florida Sugar also cites multiple eighteenth century state statutes that use "import" and "export" in the context of interstate commerce, such as a 1785 Maryland statute that imposed "duties on certain enumerated articles *imported into* and *exported out of* this state." 1784 Maryland Laws, ch. 84, § I (emphasis added). Finally, Florida Sugar cites evidence of similar usage from the Articles of Confederation, and the Constitutional Convention. In the case of the former, Florida

Sugar quotes a proposed amendment to the Articles of Confederation that would have vested power in Congress to "lay [ ] such imposts and duties upon imports and exports, as may be necessary for the purpose" of "regulating trade of the States, as well as with foreign nations, as with each other." Appellant's Brief at 17 n.36 (citing 28 Journals of the Continental Congress, Mar. 28, 1785, p. 201, and *Camps Newfound*, 520 U.S. at 628). At the Constitutional Convention, Florida Sugar reports that in relation to the Export Clause, James Madison recorded:

> Mr. Mercer was strenuous against giving Congress power to tax exports. Such taxes are impolitic, as encouraging the raising of articles not meant for exportation. The states had now a right, where their situation permitted, to tax both the *imports and exports of their uncommercial neighbors*.
>
> Appellant's Brief at 20 (citing *Debates on the Adoption of the Federal Constitution Vol. 5* 433-34 (J. Elliot, ed., J.S. Lipincott, 1896) (emphasis added)).[11]

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[11] Appellant has assembled an impressive collection of advertisements, news articles and state statutes, as well as some excerpts from debates of the Continental Congress and the Constitutional Convention, indicating that "export" was often understood to include a shipment from one state to another in the eighteenth century. The recitation of evidence is far too lengthy to reproduce here in its entirety, so we have included some representative examples.

While the evidence assembled by Florida Sugar may be more than adequate to demonstrate a usage, especially in common, lay contexts, of the term "export" at the time the Constitution was drafted, we do not find it persuasive in proving the meaning the Framers intended for the precisely and carefully crafted clauses of the Constitution itself. As a mere glance at any modern newspaper reveals, the same word can have different meanings in different contexts and is frequently given a broader definition in common, lay usage than one sees in legal instruments. More recent usages of "export" cited in Florida Sugar's own brief demonstrate this point. For example, recent newspaper articles refer to New York "exporting the city's trash" to Virginia.[12] Nevertheless, today the *legal* definition of export is generally understood to refer solely to foreign commerce. *See, e.g., Black's Law Dictionary* 579 ("Export, v. To carry or to send abroad. To send, take, or carry an article of trade or commerce out of the country . . . Exports, n. Products manufactured in one country and then shipped and sold in another."). Despite this departure from generally accepted legal and eco-

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The dissent in *Camps Newfound* recites a similar collection of evidence. *See Camps Newfound*, 520 U.S. at 623.

[12] Bruce Lambert, *Giuliani Explains Why Others Should Take City's Trash, New York Times*, Jan. 14, 1999, A19; *see also* Eric Lipton, *Five States Challenge New York's Trash Plan, Washington Post*, Feb. 7, 1999, cited in Appellant's Brief at p. 21 n.44.

nomic definitions, the meaning of the term "export" in the cited newspaper articles is clear to readers -- New York City's trash is being sent to Virginia for disposal. Similarly, the use of "export" in other articles on the same day in the same newspaper unquestionably refers to the international sale of goods.[13] We find usage in eighteenth century newspaper advertisements, articles, or state statutes no more helpful in interpreting the intended meaning of the word "export" in the Constitution than a modern-day *New York Times* article about trash shipments would be in interpreting the meaning of "export" in the HMT statute at issue in this case. Records from the Constitutional Convention, however, are much more persuasive.

Convention debate records reveal that the Export Clause arose in response to sectional differences dividing the former colonies. The Northern delegates, opposed to slavery, objected to the continued importation of slaves from Africa and to the Southern states' proposal for counting slaves in the apportionment of congressional representatives. In response, the Northern delegation advocated the possi-

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[13] Sam Dillon, *Turmoil In Brazil: The Ripple Effects, New York Times*, Jan. 14, 1999, C5; Michael M. Weinstein, *Turmoil in Brazil: The Mistakes, New York Times*, Jan. 14, 1999, C1; Edward Wyatt, *Wall Street Recoils From Brazil's Turmoil, Then Collects Itself, New York Times*, Jan. 14, 1999, C1; Larry Rohter, *Turmoil In Brazil: The Overview; Brazil Devalues Its Currency 8%, Roiling Markets, New York Times*, Jan. 14, 1999, A1.

bility of a tax on foreign exports. James Madison reports, for example, that Rufus King of Massachusetts argued: "If slaves are to be imported shall not the exports produced by their labor, supply a revenue the better to enable the Genl. Govt. to defend their masters. . . . At all events, either slaves should not be represented or exports should be taxable." *Records of the Federal Convention of 1787, Vol. II* 220 (Madison, Aug. 8) (Max Farrand, ed.) (hereinafter, "*Records of the Federal Convention*"). According to historians, the South "feared that possession of [the power to tax exports] by Congress would enable the North to discriminate against it, by a tax which would operate only on the peculiarly Southern articles of export," specifically the cash crops of tobacco, rice and indigo. Charles Warren, *The Making of the Constitution* 572 (1993); *see also* Christopher Collier & James Lincoln Collier, *Decision in Philadelphia: The Constitutional Convention of 1787* 166 (1986).

Our examination of the records of these debates about the Export Clause and the importation of slaves reveals that the delegates to the Constitutional Convention were referring only to foreign exports. For example, in arguing in favor of granting Congress the power to tax such exports James Madison said, "[a] proper regulation of exports may [and] probably will be necessary hereafter, and for the same purpose as the regulation of -- imports; . . . procuring equitable regulations *from other nations.*" *Records of the Federal Convention* 361 (Madison, Aug. 21) (quoting James Madison) (emphasis added). *See also* Warren, *supra* 572 (reporting that delegates to the Constitutional Convention argued that the

power to tax exports would be "more effectual than that over imports in obtaining beneficial *treaties* of commerce" (emphasis added)). Similarly, a delegate arguing in favor of the Export Clause declared

> The case of Exports was not the same with that of imports. *The latter were the same throughout the states*: the former very different. As to Tobacco *other nations* do raise it, and are capable of raising it as well as [Virginia] &c. The impolicy of taxing that article had been demonstrated by the experiment of Virginia.

Records of the Federal Convention 363 (Madison Aug. 21) (quoting George Mason) (emphasis added). For the "imports" in question to be "the same" throughout the states, they must be items imported from foreign countries. As the various states had different principal items of production, the delegates would not have referred to shipments from sister states as being "the same."

In a similar vein, another delegate discussing the clause noted that "Pennsylvania exports the produce of Maryd. N. Jersey, Delaware. . . ." *Records of the Federal Convention* 362 (Madison, Aug. 21) (quoting James Wilson). In that instance, it appears that the delegate intended the verb "exports" to refer to foreign commerce, for a reference to interstate commerce would discuss Pennsylvania's "importation" of produce from Maryland, etc. Similarly, with regard to the portion of the Constitutional Convention debate cited by Florida Sugar, referencing the

states' right "to tax both the *imports and exports of their uncommercial neighbors*," it appears that "uncommercial" states was a reference to states without seaports. Thus, the exports discussed in that quote were actually exports to foreign countries from landlocked states being shipped via states with seaports.

As discussed above, the debate over the Export Clause and that concerning the importation of slaves and the counting of slaves in the apportionment of seats in Congress were closely intertwined. The *Records of the Federal Convention* indicates that the draft entrusted to the "Committee of Style" also treated the two clauses as linked. In that draft, Article VII, § 4 included, in the same paragraph, the Export Clause and a clause permitting the continued importation of slaves and authorizing an import tax on slaves of up to ten dollars.[14] In debating whether the Constitution should prohibit the importation of slaves, the Southern delegates asserted that such a bar would unduly advantage Virginia, which had a population of slaves that "exceeded the call for their services," by "creating a monopoly in [its] favor" and allowing it to "name [its] own terms" in the sale of slaves to other Southern states that required more slaves. *Id.* at 378 (McHenry, Aug. 22). If a bar on

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[14] "The migration or importation of such persons as the several States now existing shall think proper to admit shall not be prohibited by the Legislature prior to the year 1808 -- but a tax or duty may be imposed on such importation not exceeding ten dollars for each person." *Records of the Federal Convention* 571 (Committee of Style).

importation would advantage Virginia, then sale of a slave from Virginia to Mississippi would not be considered an "import." Thus, in the draft sent to the Committee on Style, the other clauses in the same paragraph as the Export Clause dealt only with foreign commerce. The grouping of these clauses together indicates that the Framers saw the clauses as interrelated and addressing similar subject matter, namely international commerce.

Finally, the North-South divide on the Export Clause itself provides strong evidence that the tax being discussed was one on shipments in foreign commerce alone. Because the Southern cash crops were sold overseas and had less competition on the world market, they were attractive targets for an export tax. *See, e.g.*, Warren, *supra* at 572 ("The South, being agricultural and having three great crops *which grew nowhere else*, . . . feared that the possession of this power by Congress would enable the North to discriminate against it, by a tax which would operate only on the peculiarly Southern articles of export." (emphasis added)). More importantly, a significant portion of the industrial output of the North was not exported to foreign countries at all, but sold within the United States. *See, e.g.*, Joint Appendix at 121 (table prepared by appellants showing annual overseas export of the Southern colonies in 1768-72 at 1765 pounds sterling, while New England and the Mid-Atlantic colonies' overseas exports were 1036 pounds annually. The latter's sales to other North American colonies were 524 pounds compared to 191 for Southern colonies.) (citing, J. Shepard & S. Williamson, "The Coastal Trade

of the British North American Colonies, 1768-1772," *J. of Econ. History*, Vol. XXXII, No. 4, p. 783). A tax on interstate shipments would thus prejudice the North as well as the South, whereas a tax on exports to foreign countries was more likely to threaten mainly the South because the South both exported more and had exports that were unique and thus more amenable to taxation. During the Constitutional Convention it was the Southern states that insisted on the continuation of slavery and a ban on export taxes, while the Northern delegates generally sought to protect the ability of the federal government to raise money from taxation on exports. *See* Warren, *supra* at 574. For the tax under debate to have disproportionately injured the South, it could not have been a tax on interstate commerce. The vigorous opposition of the Southern delegates to the tax is thus evidence that the tax being discussed was a tax on shipments to foreign countries.

Having reviewed the debates carefully, we conclude that the Framers were consistently using "export" in a foreign commerce context when they drafted and debated the Export Clause.

B.

Like clauses in a statute, related clauses of the Constitution should be interpreted to avoid contradictions in the text or the rendering of some part of the text superfluous. *Cf. Regions Hospital v. Shalala*, 522 U.S. 448, 466-67 (1998) ("It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. . . .

'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times." (*quoting Market Co. v. Hoffman*, 101 U.S. 112, 115-16, (1879)). Reading the Export Clause in light of other clauses of the Constitution provides additional indications that the Framers intended it only to limit federal powers with regard to foreign commerce.

Interpreting the Export Clause as Florida Sugar urges creates an inconsistency in the clauses of the Constitution. As Chief Justice Miller pointed out in *Woodruff v. Parham*, 75 U.S. 123, 132 (1868), "no article can be imported from one state into another which is not, at the same time, exported from the former." In other words, a ban on taxing "exports" from one state to another would necessarily ban taxes on any interstate shipment. Thus, extension of the Export Clause prohibition to interstate commerce would seem to limit severely the powers granted to the federal government in the Commerce Clause. *See* U.S. Const. Art. I, § 8, cl. 3 (Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes."). The power to regulate commerce with foreign nations is not completely curtailed by the bar on export taxes, as the federal government may still tax imports. In the case of interstate commerce, however, imports and exports are two sides of the same coin; thus, a bar on taxing "exports" from one state to another necessarily bars taxing "imports" into one state from another, thereby

eliminating any federal government power to tax interstate commerce.

Furthermore, the Export Clause only proscribes the activities of the federal government and thus must be viewed in that context. As Justice Thomas explains in his *Camps Newfound* dissent, "the word import derived its meaning from the jurisdiction into which goods were imported." *Camps Newfound*, 520 U.S. at 625. The same reasoning applies equally to the word "export." An "export" must necessarily originate from one jurisdiction and terminate in another jurisdiction. Thus, when interpreting the scope of the meaning of the word "export" anywhere in the Constitution, we must look to the relevant jurisdiction, which, in the case of the Export Clause, is the federal government. The Export Clause only limits the federal government; thus the jurisdiction of origin is "any state" within the jurisdiction of the federal government. It follows, then, that to terminate in another jurisdiction (as it must, to be considered an "export") the destination of the shipment must be outside the jurisdiction of the federal government, namely a foreign country. For the same jurisdiction-based reasons, we find Florida Sugar's citations to eighteenth century state statutes less than persuasive.

Finally, the clause immediately following the Export Clause provides that "No preference should be given any Regulation of Commerce or Revenue to the Ports of one State over another: nor shall vessels bound to or from one state, be obliged to enter, clear, or pay Duties in another." U.S. Const., Art. I, § 9, cl.

6. Similarly, Art. I, § 8, cl. 1 of the Constitution requires that "all Duties, imposts and Excises shall be uniform throughout the United States." These clauses protect against the federal government discriminatorily taxing the interstate commerce of a particular state or region. Thus, the argument that the evil sought to be prevented by the Export Clause is discrimination resulting from taxation of interstate commerce is even less persuasive in light of the other, more specific protections against such discrimination found elsewhere in the Constitution. *Cf. Dooley v. United States*, 183 U.S. 151, 157 (1901) ("While [a tax on merchandise carried from one state to another] does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible to lay such a tax without a violation of the 1st paragraph of art. 1, § 8."). Concededly, neither of these clauses prevents a uniform, nationwide tax on goods unique to the South that could be used to raise money in a way that discriminated against the South. Such a nationwide tax, similar to the current federal taxes on cigarettes and gasoline, is not prohibited by the Constitution as such a uniform tax on goods simply is not considered a tax on "exports," however defined. *Cf. Pace v. Burgess*, 92 U.S. 372, 374 (1875) (reciting that "[a]n excise tax of thirty-two cents per pound was imposed on all manufactured tobacco. . . . tobacco intended for export was excepted" and holding that requiring a nominal fee for a stamp designating export-tobacco was not a violation of the Export Clause); *United States v. Hvoslef*, 237 U.S. 1, 13 (1915) ("[The Export Clause] is designed to give immunity from taxation to property that is *in the actual*

course of such exportation." (emphasis added)). Thus, the only possible domestic tax on exports barred by Florida Sugar's interpretation of the Export Clause would be one, such as we have here, that taxes the movement of goods between United States ports across state borders. The above-quoted constitutional clauses would require that any such tax be uniform across the United States. A uniform tax on shipments across state borders would not result in the sort of discrimination that the Southern delegates were resisting during the Constitutional Convention. Indeed, such a tax would place an equal burden on Northern products, which had larger domestic markets than Southern products.

When viewed in the context of the Convention debates and the entirety of the relevant constitutional text, we see strong indicators that the Constitution's drafters intended only to prohibit taxes on foreign commerce, not interstate shipments. We view the evidence from the debates as more persuasive than the general evidence about usage under the Articles of Confederation, in state statutes, or in articles or advertisements in newspapers of the day. Accordingly, we conclude that the Framers intended the Export Clause to prohibit only taxes on shipments to foreign countries. As the discussion below reveals, our view appears consistent with statements by the Supreme Court.

II.

A long line of Supreme Court decisions appears to assume that the Export Clause applies only

to goods shipped to a foreign country. Nevertheless, Florida Sugar is correct in its assertion that none of these cases even addresses, much less definitively resolves, the question before this court. Florida Sugar further argues that the dicta in the Supreme Court cases viewing the Export Clause as applying only to foreign commerce is, in fact, incorrect. We look first to the Supreme Court's Export Clause decisions and then address Florida Sugar's arguments that focus on Import/Export Clause jurisprudence. In light of the consistent Supreme Court dicta on the question, our analysis of the text and the intent of the Framers, *ante*, we reject Florida Sugar's assertion.

A.

The Export Clause cases all rely on *Woodruff*, which interpreted the Import/Export Clause as

> refer[ing] exclusively to foreign commerce. Its object as shown by the debates, was to secure those States, which from geographical position, could not import for themselves, from the exercise of the taxing power of the States whose ports they would be compelled to use.

75 U.S. at 128 (citing Madison Papers, 3d vol. 1445). Although *Woodruff* does not actually interpret the Export Clause, it has been widely cited in Export Clause cases.

In *Dooley*, the first case that addressed the breadth of the Export Clause, the Supreme Court referenced the *Woodruff* decision in upholding a federal statute that imposed duties on merchandise imported into Puerto Rico from New York. The *Dooley* Court reasoned that the Export Clause applied only to foreign commerce, stating "[i]f, then Porto [sic] Rico be no longer a foreign country under the Dingley act . . . we find it impossible to say that goods carried from New York to Porto [sic] Rico can be considered as 'exported' from New York within the meaning of the Constitution." *See* 183 U.S. at 154. The Court, however, decided the *Dooley* case on two alternative grounds, the second and crucial being that the tax was actually an *import* tax on goods imported into Puerto Rico, legislated by the Congress acting essentially in the capacity of the Puerto Rican legislature. *See id.* at 155-56. Thus the Court did not explicitly rely on its interpretation of the Export Clause as the ground for its decision, stating in the end:

> It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one state to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the 1st paragraph of art. 1, § 8 that "all duties, imposts, and excises shall be uniform throughout the United States." . . . *The question, however, is not involved in this case, and we do not desire to express an opinion upon it.*

Dooley, 183 U.S. at 157 (emphasis added); *see also Hooven & Allison v. Evatt*, 324 U.S. 562, 679 n.5 (1945) (stating that interpretation of the Export Clause was not necessary for the *Dooley* decision). The authority of the *Dooley* decision is perhaps further undermined by the fact that it was a split decision, with three other justices joining a dissent by Chief Justice Fuller, concluding that the Export Clause indeed applied to interstate shipments. *See Dooley*, 183 U.S. at 172 ("[Limiting the Export Clause to foreign commerce] would defeat the manifest purpose of the Constitution by enabling discriminating taxes and duties to be laid against one section of the country as distinguished from another."). Despite these weaknesses, the *Dooley* Court's dicta with regard to the Export Clause has not been questioned or weakened by subsequent Supreme Court cases interpreting the Export Clause.

The *Dooley* interpretation of the Export Clause was reiterated in *Hvoslef*, in which the Supreme Court stated:

> The constitutional provision that "no tax or duty shall be laid on articles exported from any state" has been the subject of elaborate and authoritative exposition, and we need but apply the principles of construction which have been settled by previous decisions. . . . *The prohibition relates only to exportation to foreign countries* . . . and is designed to give immunity from taxation to

> property that is in the actual course of such exportation.

Id., 237 U.S. at 13 (citations omitted) (emphasis added). That case, however, involved a claim for refund of a tax on "the carriage of cargo from state ports to foreign ports," *id.*; thus, the tax was unquestionably directed at foreign exports. Accordingly, the Supreme Court's declaration in *Hvoslef* that the prohibition in the Constitution related "only to exportation to foreign countries," *id.*, was, like the alternative *Dooley* holding, unnecessary to the decision.

More recently, in *International Business Machines*, the Supreme Court stated, the "Export Clause . . . specifically prohibits Congress from regulating *international commerce* through export taxes." 517 U.S. 843, 859 (1996) (emphasis added). Like the *Hvoslef* decision, however, *International Business Machines* addressed a statute expressly aimed at foreign exports, and thus the limitation of the Export Clause to international commerce was not necessary to the decision.

B.

Florida Sugar also argues that the subsequent cases undermine the Export Clause dicta of *Dooley*. Prior to *Woodruff*, the Import/Export Clause was interpreted as restricting the states' powers to tax interstate shipments. *See, e.g., Brown v. Maryland*, 25 U.S. (Wheat.) 419, 449 (1827) (striking down a law requiring importers from foreign countries to get a license and declaring, in dicta, that "we suppose the

principles laid down in this case to apply equally to importations from a sister state"); *Almy v. California*, 65 U.S. (24 How.) 169, 173-74 (1861) (finding a tax on documents involved in a shipment from San Francisco to New York to be a violation of the Import/Export Clause). The *Woodruff* holding, however, is clear; thus we are not swayed by Florida Sugar's citation to *Brown* or *Almy*, which must be deemed superseded by *Woodruff*.

Florida Sugar also relies heavily on a recent challenge to the *Woodruff* holding in a dissent by Justice Thomas. Joined by Justice Scalia, Justice Thomas calls into question the legal rationale of *Woodruff*. *See Camps Newfound*, 520 U.S. at 609. While a dissent carries no precedential weight, we discuss it here because it forms so central a part of Florida Sugar's argument.

Justice Thomas's *Camps Newfound* dissent questions the Court's dormant Commerce Clause jurisprudence, arguing that the Import/Export Clause should have been read to prohibit states from levying taxes on goods imported from or exported to other states. Such a reading of the Import/Export Clause would have rendered the dormant Commerce Clause jurisprudence unnecessary. To that end, Justice Thomas criticizes the *Woodruff* holding that the Import/Export Clause applies only to foreign commerce. The Thomas dissent, however, does not address the Export Clause at all and thus can hardly provide reason to question the Supreme Court's Export Clause jurisprudence. Furthermore, in *International Business Machines*, the Court, with Justice Thomas

writing, cautioned that Import/Export Clause jurisprudence is not interchangeable with Export Clause jurisprudence as the terms of the clauses have different meanings. *See* 517 U.S. at 857 ("Though we have frequently interpreted the Clauses together . . . our more recent . . . cases . . . caution that meaningful textual differences should not be overlooked."). Furthermore, Justice Thomas's opinion in *International Business Machines* states that the Export Clause "specifically prohibits Congress from regulating *international* commerce through export taxes." *Id.* at 859 (emphasis added). Thus, we have no reason to suspect that either of the dissenting justices in *Camps Newfound* would support Florida Sugar's proposed interpretation of the Export Clause.

Aside from the dissent in *Dooley*, appellant cites no Supreme Court case suggesting that the Court would interpret the Export Clause to apply to interstate commerce. The best evidence that Florida Sugar can marshal for its position is apparently ancient case law on the Import/Export Clause that has been overruled and a dissent discussing the Import/Export Clause in the context of dormant Commerce Clause jurisprudence. Accordingly, we do not find relevant, much less persuasive, Florida Sugar's lengthy discussion of the Import/Export Clause, particularly the dormant Commerce Clause discussion in the *Camps Newfound* dissent.

CONCLUSION

The reports from the Constitutional Convention, historical analyses of the drafting efforts, and

our own review of the Export Clause in the context of several related constitutional clauses, reveal that the Framers intended only to deny the federal government power to impose taxes on exports from the United States to foreign countries. In addition, while there is no Supreme Court precedent directly on point, the alternative ground for decision given in *Dooley* and the dicta in both *Hvoslef* and *International Business Machines* provide this court with consistent guidance from the Supreme Court indicating that the Export Clause cannot logically be interpreted to ban federal taxes on interstate shipments from one port to another. Accordingly, we hold that the Export Clause does not prohibit federal taxes on interstate shipments and thus does not block the application of the HMT to Florida Sugar's shipments between ports in different states. Taxes collected from Florida Sugar were not constitutionally prohibited and so no refund is due, as the trial court correctly held. Consequently, dismissing the action was not error. We therefore,

AFFIRM.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip Op. 99-28:

Court No. 98-05-01303

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC., PLAINTIFF

v.

UNITED STATES, DEFENDANT

[March 23, 1999]

OPINION

Before: RESTANI, Judge.

RESTANI, Judge:

This matter is before the court on cross-motions for summary judgment. In this action plaintiff seeks to have declared unconstitutional the Harbor Maintenance Tax (HMT) established by 26 U.S.C. §§ 4461, 4462 (1994), as applied to interstate shipments.

Between January 27, 1995 and February 20, 1998, plaintiff Florida Sugar Marketing and Terminal Association, Inc., paid this ad valorem tax on shipments of sugar from ports of one state to ports of other states. Because the tax is imposed upon shipment, the parties apparently agree that the HMT at issue was assessed upon export from a state, as opposed to import into another state.

Plaintiff asserts that the HMT violates the Export Clause, Art. I, § 9, cl. 5 of the Constitution, which provides "No Tax or Duty shall be laid on Articles exported from any State," relying on *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (holding HMT invalid as applied to exports to foreign countries). The parties to the action disagree as to whether it is a binding holding of *Dooley v. United States*, 183 U.S. 151, 154 (1901) (Congress permitted to impose tax on exports from New York imported into Puerto Rico) that "exports" for purpose of the Export Clause means exports to foreign countries. The *Dooley* court cited *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868) (holding Import-Export Clause of Constitution[15] did not bar Alabama sales tax on merchandise from another state), for that proposition.

---

[15] The Import-Export Clause, Article I, § 10, cl. 2 reads in part:

> No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.

The *Dooley* court, however, clearly held that the tax at issue was a valid tax on *imports* into Puerto Rico. *Dooley*, 183 U.S. at 155. Thus, the status of the statement in Dooley with respect to exports is not certain.

Despite the fact that *Dooley* has been cited by the Supreme Court specifically for this point, *see Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 n. 44 (1946), plaintiff argues that *Dooley's* statement on the meaning of "exports" is *dicta*. It cites *Hooven & Allison Co. v. Evatt ("Hooven I")*, 324 U.S. 652 (1945) (holding articles brought from the Philippine Islands into the United States were imports immune from state taxation under the Import-Export Clause, because the Philippines were not part of the United States in constitutional sense), *overruled on other grounds*, *Limbach v. Hooven & Allison Co. ("Hooven II")*, 466 U.S. 353 (1984). *Hooven I* stated in what also seems to be *dicta*, that *Dooley's* export definition was *dicta*. *Hooven I*, 324 U.S. at 670 n.5. The court, however, need not resolve the exact status of the operative words in *Dooley*.

The parties agree that the Dooley court's choice to make no distinction between the meaning of export in the Export Clause and in the Import-Export Clause as set forth in *Woodruff v. Parham*, has been long adhered to. *See, e.g., Kosydar v. National Cash Register Co.*, 417 U.S. 62, 67 n. 5 (1974); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 83 (1946). Plaintiff does not contend that the court can ignore the longstanding view that "exports" means the same in both clauses.

Plaintiffs' main argument is that *Woodruff* (and *Dooley* to the extent it followed *Woodruff*) was wrongly decided, citing the Thomas/Scalia dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609-610 (1997). The dissent contends that the negative Commerce Clause rationale used by the majority to strike down a property tax with an exemption for charitable institutions benefitting residents is untenable. *Id.* at 610. The negative Commerce Clause is said to be unnecessary to check discriminatory state taxes on the commerce of other states because the Import-Export Clause serves that purpose, "Woodruff, notwithstanding." *Id.*

Whatever the merits of the point of view expressed in the Camps dissent, this court must follow decisions of the Supreme Court which have not been overruled. As accurately stated by plaintiff, "the [Supreme] Court has repeatedly followed Woodruff in a line of cases over the years." Pl. Br. at 3. The court must do the same now.

Accordingly, the court finds the Export Clause does not prevent the imposition by Congress of taxes on interstate shipments and judgment is found for defendant dismissing this action for failure to state a claim.

APPENDIX C

1. Article I, Section 9, Clause 5 of the Constitution of the United States provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. 26 U.S.C. 4461 provides:

> (a) General rule.---There is hereby imposed a tax on any port use.
>
> (b) Amount of tax.---The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of tax.---
>
> (1) Liability.---The tax imposed by subsection (a) shall be paid by--
>
> (A) in the case of cargo entering the United States, the importer,
>
> (B) in the case of cargo to be exported from the United States, the exporter, or
>
> (C) in any other case, the shipper.
>
> (2) Time of imposition.---Except as provided by regulations, the tax imposed by subsection (a) shall be imposed--

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

3. 26 U.S.C. 4462 provides:

(a) Definitions.---For purposes of this subchapter--

(1) Port Use.---The term ``port use'' means--

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

(2) Port.---

(A) In general.---The term ``port'' means any channel or harbor (or component thereof) in the United States, which--

(i) is not an inland waterway, and

(ii) is open to public navigation.

*****

(3) Commercial cargo.---

(A) In general.---The term ``commercial cargo'' means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

(B) Certain items not included.---The term ``commercial cargo'' does not include--

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

*****

4. 19 C.F.R. 24.24 provides:

(a) Fee. Commercial cargo loaded on or unloaded from a commercial vessel is subject to a port use fee of 0.125 percent (.00125) of its value if the loading or unloading occurs at a port within the definition of this section, unless exempt under paragraph (c) of this section or one of the special rules in paragraph (d) of this section is applicable.

(b) Definitions. For the purpose of this section:

(1) Port means any channel or harbor (or component thereof) in the customs territory of the United States which is not an inland waterway and is open to public navigation and at which Federal funds have been used since 1977 for construction, maintenance or operation. It does not include channels or harbors deauthorized by Federal law before 1985.

*****

(2) Commercial cargo means, unless exempted by paragraphs (c) (1) and (2) of this section, merchandise transported on a commercial vessel and passengers transported for compensation or hire. Whenever the term ``cargo'' is used, it means merchandise, but not passengers.

(3) Commercial vessel means, unless exempted by paragraph (c)(3) of this section, any vessel used in transporting commercial cargo by water for compensation or hire, or in transporting commercial cargo by water in the business of the owner, lessee or operator of the vessel.

*****

(e) Collections-

(1) Domestic vessel movements-

(i) Time and place of liability. Subject to the exemptions and special rules of this section, when cargo is loaded on a commercial vessel at a port within the definition of this section to be transported between ports in the U.S. or is unloaded from a commercial vessel at a port within the definition of this section after having been transported between ports in the U.S., the shipper (the person or corporation who pays the freight) of that cargo is liable for the payment of the port use fee at the time of unloading. The fee will be imposed only once on a movement pursuant to paragraph (d)(2) of this section.

*****

(ii) Fee payment. The shipper whose name appears on the Vessel Operation Report shall pay the accumulated fees on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service for all fees for which he is liable for the quarter and a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915.

*****

(f) Quarterly payments. All quarterly payments required by this section must be received no later than 31 days after the close of the quarter being paid. Quarterly periods end on the last day of March, June, September, and December.

*****

(2)

No. 00-660

In the Supreme Court of the United States

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1017

QUESTION PRESENTED

Whether the Export Clause of the Constitution prohibits application of the Harbor Maintenance Tax, 26 U.S.C. 4461, to interstate shipments of goods.

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In the Supreme Court of the United States

No. 00-660

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 220 F.3d 1331. The opinion of the Court of International Trade (Pet. App. 26-29) is reported at 40 F. Supp. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2000. The petition for a writ of certiorari was filed on October 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Water Resources Development Act, Pub. L. No. 99-662, 100 Stat. 4082, was enacted in 1986 to provide comprehensive improvements in the Nation's ports and harbors. To fund such improvements, Title XIV of the Act (§ 1402(a), 100 Stat. 4266) established the Harbor Maintenance Tax, 26 U.S.C. 4461 *et seq.*, which imposes an *ad valorem* tax on the use of ports by importers, exporters, domestic shippers, and passenger liners. The Harbor Maintenance Tax is imposed on "any port use" by an "importer," "exporter," or "shipper" on the basis of the value of the "commercial cargo" shipped through the port. 26 U.S.C. 4461(a)-(c). "Commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. 4462(a)(3)(A). Revenue from the tax is placed in the Harbor Maintenance Trust Fund, from which amounts are withdrawn to pay for improvements in ports and harbors. 26 U.S.C. 9505. In *United States* v. *United States Shoe Corporation*, 523 U.S. 360, 363, 370 (1998), this Court held that, because the Harbor Maintenance Tax does not qualify as a "user fee," it may not constitutionally be applied to exported goods under the Export Clause of the Constitution.

2. Petitioner paid the Harbor Maintenance Tax owed on interstate shipments of sugar from ports of one State to ports of other States. Petitioner then brought this suit in the Court of International Trade, contending that application of the Harbor Maintenance Tax to interstate shipments of goods violates the Export Clause of the Constitution. Pet. App. 26-27.

The Court of International Trade rejected petitioner's contention. Pet. App. 26-29. The court con-

cluded that the precedents of this Court clearly establish that the Export Clause—which prohibits taxes upon exports of goods to foreign countries—does not prohibit imposition of federal taxes on interstate shipments of goods. *Id.* at 28-29 (citing, *e.g.*, *Dooley* v. *United States*, 183 U.S. 151 (1901)).

3. The court of appeals affirmed. Pet. App. 1-25. The court concluded that the text of the Export Clause, as well as the records and debates from the Constitutional Convention, demonstrate that the Framers intended that Clause to prohibit only taxes upon export shipments of goods to foreign countries. *Id.* at 5-14. The court observed that several decisions of this Court have concluded that the term "exports" applies only to shipments to foreign countries (*id.* at 15-19) and that the "prohibition [of the Export Clause] relates only to exportation to foreign countries * * * ." *Id.* at 21 (quoting *United States* v. *Hvoslef*, 237 U.S. 1, 13 (1915)). The court of appeals concluded that the reasoning set forth in these decisions reflects "consistent guidance from the Supreme Court indicating that the Export Clause cannot logically be interpreted to ban federal taxes on interstate shipments from one port to another." Pet. App. 25.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The Federal Circuit properly concluded that the Export Clause does not prohibit assessment of the Harbor Maintenance Tax on interstate shipments of goods. The Export Clause of the Constitution constrains the federal taxing power by providing that "[n]o

Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. The longstanding precedents of this Court have consistently concluded that, while the Export Clause restricts federal taxation of exports to foreign countries, it does not restrict federal taxation of interstate shipments of goods. For example, in *Dooley* v. *United States*, 183 U.S. 151, 154 (1901), the Court specifically concluded that the Export Clause applies only to taxes imposed on foreign commerce. That case involved a federal statute that imposed duties on merchandise shipped between New York and Puerto Rico. *Id.* at 153. The statute was "attacked upon the ground of its violation of that clause of the Constitution (art. 1, § 9) declaring that 'no tax or duty shall be laid on articles exported from any state [the Export Clause].'" *Ibid.* The Court rejected that claim because "the word 'export' should be * * * applied only to goods exported to a foreign country." *Id.* at 154. Because Puerto Rico was not a foreign country, the Court found "it impossible to say that goods carried from New York to Porto Rico can be considered as 'exported' from New York within the meaning of [the Export Clause] of the Constitution." *Id.* at 154-155.

Petitioner errs in asserting (Pet. 5 n.2) that this clear holding of the Court in *Dooley* was merely dicta. There was, as this Court subsequently noted, an additional ground upon which the tax in *Dooley* could have been, and was, sustained. The tax in *Dooley* was valid not only because it did not violate the Export Clause but also because it was "a valid exercise of the power of Congress to enact laws for the government of a dependency acquired by treaty." *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 670 n.5 (1945). Although the Court's holding under the Export Clause in *Dooley* was

thus "an alternative ground" for decision in that case (*Hooven & Allison Co.* v. *Evatt*, 324 U.S. at 670 n.5), that does not make that holding dicta. "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Instead, each of the alternative holdings constitutes valid, binding precedent of the Court. *Ibid.* See also *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 346 n.4 (1986); *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948).

Moreover, in cases following *Dooley*, the Court has consistently repeated the conclusion that the Export Clause has no application to federal taxes imposed on interstate shipments of goods. For example, in *United States* v. *Hvoslef*, 237 U.S. 1 (1915), the Court cited *Dooley* and *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1868), as support for the conclusion that the Export Clause "prohibition relates only to exportation to foreign countries." 237 U.S. at 13. Similarly, in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434 n.44 (1946) (citation omitted), the Court reiterated that the Export Clause was "held applicable only to foreign commerce in *Dooley* v. *United States*." See also *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 859 (1996) (the "Export Clause * * * specifically prohibits Congress from regulating *international* commerce through export taxes") (emphasis added).

The conclusion that the Court has thus consistently drawn as to the proper scope of the Export Clause conforms to the traditional understanding that articles are deemed "exports" only after they enter the "export stream"—that is, "during transportation of the goods from the United States to a foreign country." 1 Ronald

D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 5.9, at 477 (2d ed. 1992). See, *e.g.*, *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974) (the Import-Export Clause applies only once the article enters the stream of exportation); *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 83 (1946) ("The means of shipment are unimportant so long as the certainty of the foreign destination is plain.").

2. Petitioner's effort to overturn this settled precedent is based primarily upon its contention that, in the eighteenth century, the term "export" could have been understood to include both foreign and interstate shipments. Pet. 7-9. As the Federal Circuit properly noted in rejecting petitioner's contention, however, the relevant historical usage is the usage employed by the Framers—and the best evidence of that usage is in the records and debates of the Constitutional Convention, not "in common, lay" documents of the type on which petitioner seeks to rely. Pet. App. 8. The court of appeals carefully reviewed the Convention records and debates, which reveal "that the delegates to the Constitutional convention were referring only to foreign exports" in the "debates about the Export Clause." *Id.* at 10. The records of the Constitutional Convention establish that the Export Clause was the result of a compromise between the Northern and Southern delegates that concerned "shipments in foreign commerce alone." *Id.* at 13. See also *Fairbank* v. *United States*, 181 U.S. 283, 292 (1901). The debates reflect the same conclusion reached by this Court in *Dooley* and by the court of appeals in the present case: "that the Framers were consistently using 'export' in a foreign commerce context when they drafted and debated the Export Clause." Pet. App. 14.

3. Petitioner errs in suggesting (Pet. 6) that the dissent in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 609 (1990) (Thomas, J., dissenting), supports the contention that the Export Clause prohibits taxes upon interstate shipments. The dissent in *Camps Newfound* does not discuss or analyze the Export Clause. Instead, the dissent in that case suggests that the Import-Export Clause*—which has been interpreted by the Court to apply only to state taxes on shipments to and from foreign countries—could be read broadly to include a prohibition upon state taxes on interstate as well as foreign shipments. *Id.* at 636-637.

The reservations expressed by the dissent in the *Camps Newfound* case were not, of course, adopted by the Court in that case or in any subsequent decision. Moreover, although the Import-Export Clause and the Export Clause are often given consistent interpretations, this Court recently stated that "[i]t is simply no longer true that the Court perceives no substantive difference between the two Clauses." *United States* v. *International Business Machines Corp.*, 517 U.S. at 859. And, the opinion of the Court delivered by Justice Thomas in the *International Business Machines* case expresses the same understanding of the Export Clause established in *Dooley*—that it "prohibits Congress from regulating *international* commerce through export taxes." *Ibid.* (emphasis added).

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* U.S. Const. Art. I, § 10, Cl. 2 provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports * * * ."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2001

Supreme Court, U.S.
FILED
JAN 31 2001
OFFICE OF THE CLERK

(3)

No. 00-660

In The
Supreme Court of the United States

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner, Florida Sugar Marketing and Terminal Association, Inc., submitted a corporate disclosure statement pursuant to Rule 29.6 in its Petition for a Writ of Certiorari dated October 25, 2000. No changes to that statement are necessary.

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In The
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FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY TO BRIEF IN OPPOSITION

Pursuant to Rule 15.6 of the Rules of this Court, Petitioner presents the following reply to the Brief of the United States in Opposition ("Govt Opposition") to Petitioner's Petition for a Writ of Certiorari.

I. The "alternative holding" doctrine does not apply; *Dooley v. United States* is *dicta* so far as the Export Clause is concerned.

The Government contends this case is controlled by an "alternative holding" in *Dooley v.*

United States, 183 U.S. 151, 46 L.Ed. 128 (1901), such that this Court need not hear this case. In *Dooley*, this Court considered a tax on goods imported into Puerto Rico from New York, and it sustained the tax on the basis of a statute, concluding the tax was on *imports*, not exports. *See infra.* It also discussed counsel's contention that the Export Clause[1] proscribed the tax for being an exaction on exported goods.[2] Here, the Government describes the Export Clause discussion as one of two "alternative holdings."

Dooley's Export Clause discussion is merely *dicta*, not a holding. This Court described it as such in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 89 L.Ed. 1252 (1945) (*"Hooven I"*), *overruled on other grounds* (*i.e.*, on the so-called "original package" doctrine, which had nothing to do with the Export Clause), *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 80 L.Ed.2d 356 (1984) (*"Hooven II"*). The Court wrote:

> In Dooley v. United States, 183 US 151, 46 L. Ed 128, 22 S Ct 62, the Court sustained under the Foraker Act of April 12, 1900 *** the levy and collection of a

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1 Art. I, Sec. 9, Cl. 5, U.S. Constitution.

2 Citing *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 19 L.Ed. 382 (1869), the Court characterized "export[s]" as shipments to a *foreign country* and observed that Puerto Rico was a mere dependency, such that counsel's argument would be invalid. *Dooley*, 183 U.S. at 154-55, 46 L.Ed at 130.

> tax in Puerto Rico upon goods brought there from New York. The tax was held to be a valid exercise of the power of Congress to enact laws for the government of a dependency acquired by treaty ***. The Court stated also as an alternative ground, *but one unnecessary for decision*, that the levy was not a prohibited tax on exports, since Puerto Rico was not a foreign country. [Emphasis added.]

324 U.S. at 670 n.5, 89 L.Ed. at 1266 n.5.[3] Thus, what the Government calls an "alternative holding" was language "unnecessary for decision." Language in judicial opinions unnecessary to decisions is merely *dicta*, not precedent. *Kastigar v. United States*, 406 U.S. 441, 454-55, 32 L.Ed.2d 212, 223 (such language not precedent), *reh. den.*, 408 U.S. 931, 33 L.Ed. 2d 345 (1972); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 134 L.Ed.2d 252, 273 (1996) (court bound only by portions of opinion *necessary to decision*); *United States v. Gaudin*, 515 U.S. 506, 522, 132 L.Ed.2d 444, 458 (1995) (courts may disregard *dicta*). Therefore, the *Hooven I* characterization defeats the Government's main argument here.[4]

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[3] The Government cites this footnote to support its view that *Dooley* was decided on "alternative ground[s]." *See* Govt Opposition at 4-5. *The Government does not mention, however, the Court's characterization of the Export Clause discussion as "unnecessary for decision" (emphasis added). See id.*

[4] The Federal Circuit likewise characterized *Dooley's* Export Clause discussion as *dicta*. *See* App. at 21 ("the

A reading of *Dooley* confirms the conclusion. As stated, Counsel therein attacked the challenged tax as violating the Export Clause, and the Court immediately addressed the contention. 183 U.S. at 153-54, 46 L.Ed. at 130. It then, however, reformulated the issue to whether the tax was an *import* tax for the benefit Puerto Rico. 183 U.S. at 155, 46 L.Ed. at 130. The Court concluded affirmatively and reached its holding in the case. *Id.* Thus, the discussion of the Export Clause was inessential to the decision, such that the *Hooven I* Court and the Federal Circuit (*see* note 4 *supra*) characterized the discussion correctly.

Two further principles underscore the conclusion.

First, Federal courts avoid unnecessarily deciding constitutional issues, and consequences flow from that. In *Escambia County v. McMillan*, 466 U.S. 48, 80 L.Ed.2d 36 (1984), for example, a litigant asserted claims under a statute and the Fourteenth Amendment. 466 U.S. at 51, 80 L.Ed.2d at 39. This Court, *on grounds of mootness*, declined to consider the Fourteenth Amendment when it found it was able to dispose of the case on the basis of the statute; it said:

Dooley Court's dicta ***"). The Court further said: "*** the [*Dooley*] Court did not explicitly rely on its interpretation of the Export Clause as the ground for its decision ***." App. at 20.

> We decline to decide this question [involving the Fourteenth Amendment]. As the Court of Appeals noted, the District Court's judgment rested alternatively upon the Voting Rights Act. *** *Affirmance on the statutory ground would moot the constitutional issues presented by the case.* [Emphasis added.]

Id. In *Dooley*, this Court upheld the challenged tax on a statutory ground. Perforce, when it also discussed the Export Clause it effectively discussed a moot issue, such that the discussion was nothing more than *dicta*, not a holding in the case.

Second, Federal courts lack power to decide merely abstract questions, so unnecessary discussions of issues in opinions cannot assume the status of holdings. *E.g., United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446, 124 L.Ed.2d 402, 412 (1993) (Federal judicial power limited to resolving cases or controversies). This necessarily limits any theory of "alternative holdings." The Fourth Circuit explained the point in *Karsten v. Kaiser Foundation Health Plan*, 36 F.3d 8 (4th Cir. 1994):

> Rulings in the alternative are a tricky subject. On the one hand, they have great appeal, for they allow a judge to give multiple reasons to support his or her holding and thus, in some circumstances, allow a reviewing court the op-

> portunity to address each of the issues at once, without the cost in time and effort that would arise from each justification for a particular result being handled by seriatim appeal. ***
>
> But alternative holdings also provide courts, particularly appellate courts reviewing alternative holdings below, with the tempting opportunity *to stray into the practice of advisory opinion-making, solving questions that do not actually require answering in order to resolve the matters before them.* If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest *dicta*. [Emphasis added.]

36 F.3d at 11. As stated, *Dooley's* Export Clause discussion was unnecessary to the decision. The Government ignores this fact, as well as the rule on advisory opinions, when it characterizes that discussion as a "holding" in the case.

Significantly, in arguing the doctrine of "alternative holdings" the Government makes no attempt to *demonstrate* the doctrine's *application* as judged by the standards in the cases it cites. In *Woods v. Interstate Realty Company,* 337 U.S. 535, 537, 93 L.Ed. 1524, 1526 (1949), this Court invoked the doctrine when a decision *rested* on two or more grounds, such that neither could be relegated to the status of

dicta. Similarly, in *MacDonald, Sommer & Frates v. County of Yolo et al.*, 477 U.S. 340, 346 n.4, 91 L.Ed.2d 285, 292 n.4 (1986), the Court again spoke of "rest[ing]." Finally, in *Massachusetts v. United States*, 333 U.S. 611, 622-623, 92 L.Ed. 968, 977 (1948), the Court applied the "alternative holding" doctrine when "[n]either claim was either more or less *essential* to decision than the other ***" (emphasis added).

These tests are unmet here. Again, as noted, both this Court and the Federal Circuit have characterized the *Dooley* Export Clause discussion as *unnecessary to the decision*. *See supra*. Therefore, the judgment in *Dooley* did not "rest" on the Court's discussion of that Clause. Much less was that discussion "essential" to the Court's decision.

In short, there was no "alternative holding" in *Dooley* dealing with the Export Clause, so *Dooley* is not controlling here. Therefore, the Government's main argument for opposing this Petition is misdirected and should be rejected.

II. Cases citing *Dooley* are not on point.

The Government cites additional cases, asserting that each "follo[ws] *Dooley*" for the foreign-country "standard," and offers them as further reason for this Court to deny the instant Petition. Govt Opposition at 5. Those cases are not in point. The ones involving the Export Clause (or the somewhat

similar Import/Export Clause[5]) did not raise issues concerning *destination*, so they did not involve any adjudication respecting the validity of the foreign-country "standard."[6] The last case was a *Commerce Clause*[7] case where the reference to *Dooley* was purely in passing.[8] Thus, none of the cases "follo[ws]" *Dooley* in any precedential way. Accordingly, the Federal Circuit was wholly correct in saying that this

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5 Art. 1, Sec. 10, Cl. 2, U.S. Constitution.

6 *See United States v. Hvoslef*, 237 U.S. 1, 59 L.Ed. 813 (1915) (involving whether Congress could tax a particular *service* provided in the process of exporting goods, when the Export Clause speaks of taxes on *goods*); *United States v. International Business Machines*, 517 U.S. 843, 135 L.Ed.2d 124 (1996) (involving whether Congress could tax certain transport insurance); *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 40 L. Ed.2d 660 (1974) (involving whether goods in a warehouse awaiting exportation had physically entered the export stream); and *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 91 L.Ed. 80 (1946) (involving whether placing oil into a vessel constituted a step in the "export journey"). Obviously, *destination* was not in issue. Any reference to the exports in question being to a foreign jurisdiction was unnecessary to the decision.

7 Art. I, Sec. 8, Cl. 3, U.S. Constitution.

8 *See Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 434 n.44, 90 L.Ed. 1342, 1362 n.44 (1946), citing *Dooley* and noting without scrutiny that *Dooley* had "held" that the Export Clause applied only to foreign commerce; *compare Benjamin with Hooven I, supra* (scrutinizing *Dooley* and disavowing the "foreign country" test). *See* discussion of *Hooven I, supra*.

Court "has never directly addressed the issue in this case ***." App. at 5.

In any event, this Court should discount examples of courts reciting the "foreign country" language flowing from the *dicta* in *Dooley*. The recitations likely reflect a "habit" similar to the "habit" the *Hooven I* Court detected respecting the use of the term "import" in certain Import/Export Clause cases. *Hooven I* stated:

> Since most imports originate in foreign countries, courts have not unnaturally fallen into the habit of referring to imports as things brought into this country from a foreign country. *** But the Constitution says nothing of the foreign origin of imports, and in none of these cases was it necessary to decision to formulate the rule in terms of origin in a foreign country. In each case the result would have been the same if the Court had treated imports merely as articles brought into the country from a point without.

324 U.S. at 669-670, 89 L.Ed. at 1266. The same is almost certainly true regarding the use in judicial opinions of the parallel words "export" and "exported." Again, the Government's arguments are misdirected.

CONCLUSION

The Government's main reasons for opposing this Petition lack merit and should be rejected.[9] At the same time, the Government fails to call into question Petitioner's showings that this case is important and merits this Court's further review. Accordingly, Petitioner prays that this Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: January 31, 2001

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[9] The Government makes additional arguments including ones concerning the Framers' intentions when drafting the Export Clause. Those arguments go to the merits, not to whether this case is important and merits this Court's further review. Accordingly, Petitioner relies on its Petition to rebut the Government's additional arguments.